

No. 15942

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

(RICHARD DOUGLAS FURNISH) and
EMILIE FURNISH FUNK,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANT, EMILIE FURNISH FUNK'S
OPENING BRIEF.

FILED

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LITERMOT R. LONG,

6331 Hollywood Boulevard,
Los Angeles 28, California,

Attorney for Appellant, Emilie Furnish Funk.



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I.

The court should have determined that negligence, even gross negligence in signing of blank returns, does not constitute fraud, particularly when it was not shown, and was conceded that appellant had no knowledge nor received benefit, direct or indirect, from fraudulent actions of former spouse, and was in fact a victim of said conduct.....	4
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APPELLANT, EMILIE FURNISH FUNK'S OPENING BRIEF.

Statement of the Pleadings.

The former husband of petitioner, Richard D. Furnish, was indicted for tax evasion and fined on *Nolo Contendere* plea. Deficiencies were asserted against Richard Furnish covering years 1939 to 1949, inclusive, of \$307,717.51, plus fraud penalties of \$155,945.57. Appellant Emilie Furnish Funk was held jointly and severally liable by Tax Court for years of 1939 to 1942, inclusive, on basis of joint returns signed by her for part of said deficiencies in total sum of \$35,284.58, plus fraud penalties of \$17,647.29.

An additional assessment was made against Appellant Emilie Furnish Funk for year of 1943, in which a sepa-

rate return was filed by her, for sum of \$25,063.13, plus fraud penalties of \$12,531.56. This was dismissed at time of trial by stipulation because Respondent-Appellee conceded that there was no fraud or fraudulent intent on part of Emilie Furnish Funk.

Trial of issue in Tax Court as Los Angeles, California, within appeal jurisdiction of United States Ninth Circuit Court of Appeals, and judgment in accordance with above provisions rendered on November 20, 1957. Appeal filed by both individual appellants, who are adverse to each other, for review and reversal of Tax Court's decision, pursuant to pertinent Federal Rules of Procedure.

Statement of the Facts.

The opinion of the Tax Court is conceded by this appellant to be a very concise, true and accurate picture of the facts in these cases.

Appellant Emilie was married to appellant Richard for 21 years and had four (4) children. In 1943 a divorce was obtained by Emilie, and Richard received all community property with exception of Pontiac automobile. Richard paid Emilie \$50,000.00 over four year period for what was described as true value of all community property at time of divorce. This figure was consistent with, and was then thought by her to be the true appraised value and in accordance with his reported earning power. Nine years later, appellant Emilie was served with notice of said deficiencies arising from former husband's fraudulent activities. She demurred and filed in Tax Court.

The Government conceded that she was an innocent victim and had been deliberately defrauded along with the Government, and that she had no knowledge or participated in said fraud. Furthermore, at trial, the community property was of proven value of over \$50,000.00 at time of her separation. On the basis of her non-participation, lack of knowledge and non-receipt of benefit, the Government conceded that the Statute of Limitations would bar any liability of her separate return for year of 1943, but held that her signing of joint returns in blank, made her jointly and severally liable for years of 1939 to 1942, inclusive, for not only income reported but income not reported, plus fraud penalties. The Tax Court recognized the harshness and unfairness of this decision, but stated that it lacked equity jurisdiction to alleviate it. The opinion on pages 2, 3, 7, 23, 24 and 35 of said opinion recognized the fact that an innocent party is being held liable for fraudulent activities of former spouse, when in fact said innocent party had no knowledge of, had not concurred in, nor received benefit, either direct or indirect, from said fraud. Beyond that, this appellant Emilie Furnish Funk has no contest as the trial and decision were eminently fair. This appellant's only contention was that Tax Court failed to distinguish between Fraud and Negligence, when said negligence does not result in benefit.

Specification of Error.

The only error of which appellant Emilie Furnish Funk complains is that she is being held jointly and severally liable on the basis of fraud, when, in fact, it is admitted

that she was innocent and was herself a victim of the same fraud as the Government. Facts have proven that she had no knowledge of said fraud nor the extent of the community property and has never received any benefit, directly or indirectly, from the funds concealed by Richard Furnish. She concedes that through years of harsh and cruel treatment she had been subjugated to her husband's commands and so had signed returns in blank. She further concedes that this negligence could make her liable on all income reported on each return she signed in blank. There is no issue there, it is all paid.

However, when there is no fraud shown on the part of an individual, even though said individual signed a joint return, it cannot be termed or held fraud unless there be shown that this person had knowledge, concurred in or received some benefit from said fraud. The cases, all pertinent ones which are cited in the index and herein referred to, have gone on the basis of the "Clean Hands Doctrine". The courts have sought to determine whether or not petitioner had or had not received benefit, even though denying knowledge. No case researched has been as strong in favor of petitioner as this present case. Even the *Aylesworth* case proved duress, but also proved benefit to wife. Therefore, though the unfairness be admitted, the assessment would bankrupt this appellant if permitted to stand. The decision actually imputes fraud because of marital relationship. A person should be liable on what they sign, or from which they benefit. But, here, an innocent and already wronged former spouse is being

held liable for something she knew not of, benefited not from, and did not condone. Her liability for her negligence should extend to only what is *on* the return, not also what is *not on* it. Shakespeare would have said—

“Sans intent, Sans act, Sans knowledge, Sans concurrence, Sans Benefit—where be thy Fraud? Aye, Negligence—but not Fraud.”

Therefore, this appellant contends that the Tax Court should have added a refinement to past cases and distinguished between negligence without benefit, and fraud, thus, alleviating the situation and hold Richard Furnish alone liable for taxes and penalties due on unreported income for years 1939 through 1942, inclusive.

This appellant, Emilie Furnish Funk, respectfully requests this Honorable Court to reverse the decision as pertains to her.

Respectfully submitted,

DERMOT R. LONG,

Attorney for Appellant.

